IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH NAGPUR

SA No.315/2005

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Office Notes, Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders. : Court's or Judge's orders

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**CORAM :** A.P. Lavande, J.
**Dated : November 17**, 2006

Heard Mr. Bhide, learned counsel for the appellant and Mr. Kaptan, learned counsel for the respondent.

By this appeal, the appellant takes exception to the judgment and decree dated 5.11.2004 passed by 4th Adhoc Additional District Judge, Yavatmal in Regular Civil Appeal No.99/2001 allowing the appeal filed by the respondent-defendant against judgment and decree dated 11.7.2001 passed by Civil Judge, Senior Division, Yavatmal in Regular Civil Suit No.37/1999 decreeing the suit for specific performance filed by the appellant-plaintiff.

It is the case of the plaintiff that on

19.10.1995 an agreement was entered into between the plaintiff and the defendant in respect of an area of 8 Acres 36 gunthas of land belonging to the defendant. By virtue of the said agreement, the said land was to be sold by three different sale deeds. The first sale deed in respect of three acres of land was to be executed on 8.4.1996 and there is no dispute about execution of the said sale deed. The second sale deed in respect of three acres of land was to be executed on 31.12.1997 and the plaintiff had to pay Rs. 45,000/- at the time of execution of the sale deed by cash and balance by way of post dated cheque. The third sale deed was to be executed on or before 31.12.1998 in respect of balance portion of the land. According to the plaintiff, the defendant refused/neglected to execute the second and third sale deeds. Therefore, the plaintiff filed suit for specific performance of agreement of sale in respect of balance portion of the land admeasuring 5 acres 36 gunthas. The suit

was contested by the defendant.

It was the case of the plaintiff that he was ready and willing to perform his part of the contract and he was present in the Sub Registrar office with balance consideration on 31.12.1997 as well as 31.12.1998. The trial Court, after appreciating the evidence led by the parties, held in favour of the plaintiff, inter alia, holding that the plaintiff was ready and willing to perform his part of the contract and as such he was entitled to specific performance of the contract in respect of remaining portion of the land belonging to the defendant. The lower appellate Court in appeal preferred by the defendant reversed the finding of the trial Court that the plaintiff was ready and willing to perform his part of the contract and consequently dismissed the suit for specific performance and granted refund of earnest money of Rs. 11,000/- with interest thereon @ 6%. The appellant-plaintiff has filed present appeal challenging the decree passed by the lower

appellate Court.

Mr. Bhide, learned counsel for the appellant-plaintiff submitted that the finding given by the lower appellate Court that the plaintiff was not ready and willing to perform his part of the contract is absolutely unsustainable. He further submitted that the lower appellate Court erred in law in reversing a well reasoned judgment given by the trial Court. According to learned counsel, there was no reason for the lower appellate Court to interfere with the decree passed by the trial Court which was based upon proper appreciation of the evidence led by the parties. Lastly, he submitted that the findings given by the lower appellate Court are contrary to the evidence on record and as such perverse.

Per contra, Mr. Kaptan, learned counsel for the respondent submitted that the lower appellate Court is perfectly justified in reversing the decree inasmuch as the evidence on record clearly

establishes that the plaintiff was not ready and willing to perform his part of the contract. He, therefore, submitted that no interference is called for in this appeal inasmuch as the finding given by the lower appellate Court is a pure finding of fact warranting no interference in the second appeal.

Having considered the submissions made by learned counsel for the parties and having perused the judgments passed by both the Courts below, I find no merit in this appeal. Insofar as the sale deed which was to be executed on 31.12.1997 in respect of area of 3 acres of land is concerned, the lower appellate Court held that the plaintiff had not led cogent evidence to prove that he was present in the Sub Registrar's office on 31.12.1997 to execute the sale deed and further that he had balance consideration with him which was to be paid to the defendant. The lower appellate Court also held that the plaintiff had not denied the receipt of notice dated 14.1.1998 (Ex. 56)

issued by defendant to the plaintiff by which the defendant, called upon the plaintiff to pay balance consideration of Rs. 84,000/- within a period of eight days. In the said notice, the defendant had stated that the plaintiff had failed to execute the sale deed on 31.12.1997 and further that in case the plaintiff does not pay balance consideration within eight days, the agreement shall stand terminated. The lower appellate Court relying upon the said notice and the conduct of the plaintiff after the receipt of said notice, held that the said notice as well as conduct of the plaintiff after receipt of the said notice clearly established that the plaintiff was not ready and willing to perform his part of the contract. This finding, in my opinion, is based upon proper appreciation of the evidence, oral as well as documentary, led by the parties and, therefore, cannot be said to be perverse. Once it is held that the lower appellate Court was justified in rendering the finding that the plaintiff was

not ready and willing to perform his part of the contract, no fault can be found with the decree passed by the lower appellate Court refusing decree for specific performance in favour of the plaintiff. It is well settled that in a suit for specific performance of the contract the plaintiff has to aver and prove that at all times he was ready and willing to perform his part of the contract in order to succeed in a suit for specific performance. Since the finding on the aspect of readiness and willingness on the part of the plaintiff cannot be faulted, the decree passed by the lower appellate Court cannot be said to be unsustainable and, therefore, I am unable to agree with Mr. Bhide, learned counsel for the appellant that the trial Court had correctly appreciated the evidence while decreeing the suit for specific performance filed by the plaintiff. In my opinion, the findings given by the lower appellate Court are borne out from the evidence on record and, therefore, cannot be said to be perverse.

For the reasons aforesaid, I do not find any merit in this appeal. No substantial question of law is involved in the appeal. Hence, the appeal is summarily rejected.

C.A. No. 3615/2005

Heard Mr. Bhide, learned counsel for the applicant and Mr. Kaptan, learned counsel for the respondent.

By this application, the appellant-plaintiff seeks withdrawal of amount of Rs. 1,74,300/- deposited by him in the Court of Civil Judge, Sr. Dn. Yavatmal, pursuant to the decree of specific performance passed by the trial Court. Since I have dismissed the appeal filed by the appellant against the decree passed by the lower appellate Court dismissing the suit for specific performance, the plaintiff is entitled to withdraw the said amount.

Mr. Kaptan, learned counsel for the respondent has no objection, if the plaintiff is allowed to withdraw the said amount.

Accordingly, the plaintiff is permitted to withdraw the amount of Rs.

1,74,300/- deposited by him in the trial Court. In case, the amount has been invested by the trial Court, the plaintiff is also entitled to interest accrued thereon. Needless to mention that in case the amount is not invested, the plaintiff is not entitled to any interest on the aid amount.

Application stands disposed of .

JUDGE

A.